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HAROLD B. WILLIS, Sec.

In the
Supreme Court of the United States

October Term, 1962/1963

No. 22716

BANKERS LIFE AND CASUALTY COMPANY

Respondent

vs.

The Honorable JOHN W. HOLLAND, as Chief Judge of the
United States District Court for the Southern District of Florida,
and EACK D. CRAVEY,
Respondents

On Petition for a Writ of Certiorari to
The Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Supreme Court of the United States
October Term, 1952

No. 514

BANKERS LIFE AND CASUALTY COMPANY,

Petitioner,

The Respondent, JOHN W. HOLLAND, as Chief Judge of the
United States District Court for the Southern District of Florida,

and JACK D. CRAVEY,

Respondents.

The petition for a writ of certiorari to
The Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth
Circuit is reported at 195 F. 2d 694 and is also con-
tained in the Record (R. 130).

II

JURISDICTION

The jurisdictional requisites are adequately set forth
in petitioner's brief at page 5 and page 10.

III

QUESTION PRESENTED

Is a Court of Appeals required, "in aid of . . . [its
appellate] . . . jurisdiction," to issue a writ of man-

...the District Court, which the circuit is
...the District Court of the Southern District of Florida,
...the District Court of the Southern District of Florida,
...the District Court of the Southern District of Florida.

STATUTORY PROVISIONS INVOLVED

Section 1361 (a) of Title 28 of the United States Code

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 65 Stat. 102, 28 U.S.C. 1361 (a).

STATEMENT

The action in the District Court was brought as a trade damage suit for alleged violation of the anti-trust laws,¹ and original jurisdiction of the subject matter is conferred by Congress on the United States District Court.² The complaint was filed by the Bankers Life and Casualty Company, an Illinois insurance corporation, in the United States District Court for the Southern District of Florida against Zack D. Cravey, Insurance Commissioner of the State of Georgia; J. Edwin Larson, Insurance Commissioner of the State of Florida; C. C. Bradley, Vice-President of the Reserve Life Insurance Company and certain insurance companies authorized to do business in the State of Florida and maintaining offices in the City of Miami,

¹ 15 U.S.C. 1; 16 U.S.C. 16

² 15 U.S.C. 15; 28 U.S.C. 1337

On June 16, 1968, defendant Cravey's motion to dismiss in the District Court was heard. At that time complainant offered affidavits (E. 42-77). These affidavits purported to show the existence of a conspiracy between the Insurance Commissioner of Georgia and the Insurance Commissioner of Florida and certain insurance companies and were offered in support of the position taken by him. For the first time on the hearing, that alleged co-conspirators independent of any inter-agency relationship are agents of each other in that service to one, or venue as to one, is service and venue as to the other alleged co-conspirators. Also on that hearing complainant offered excerpts from the deposition of John McArthur (E. 48-50) in an attempt to show that the appearance of H. R. Blackshear, Jr., as counsel for defendant Cravey's bonding company, amounted to a general appearance, and that he was not entitled, as counsel for Cravey, to appear specially for the purpose of questioning venue and want of jurisdiction of the person of Cravey.

On June 17, 1968, Judge Holland passed an order severing the action as to the defendant Cravey and transferring the action as to him to the Northern District of Georgia, Atlanta Division, pursuant to Section 1406(a) of the Judicial Code. (E. 78).

From the affidavits filed and the record in the case, Judge Holland in his order found the jurisdictional facts to be that defendant Cravey did not reside and was not found and did not have an agent within the Southern District of Florida, and the Court further found that neither defendant Cravey nor his attorneys had in any way waived the right to question venue.

On the same day that the order of severance and transfer was passed, the Court on *ex parte* motion of the plaintiff entered an order temporarily staying the

transfer order and all further proceedings in the case, pending the submission by the plaintiff of an application for leave to file a petition for writ of mandamus in the Court of Appeals for the Fifth Circuit seeking to vacate said order of transfer and severance. (R. 80).

On June 25, 1952, on motion of plaintiff and after due notice, the Court entered a stay order in the case pending disposition of the application for writ of mandamus in the Fifth Circuit, superseding the ex parte stay order entered June 17, 1952. (R. 81).

Application was made to the Court of Appeals for leave to file a petition for a writ of certiorari and on August 29, 1952, an order was entered by the Court of Appeals for the Fifth Circuit granting leave to file a petition for writ of mandamus. (R. 110).

On October 17, 1952, a motion to dismiss the petition for the writ of mandamus was filed in the Court of Appeals for the Fifth Circuit in behalf of Judge Holland as nominal defendant and for Zack D. Cravey as the party at interest and affected by the order sought to be vacated.

Briefs were filed by both parties [Petitioner's brief (R. 85-108) and Respondent's brief (R. 111-129)] and thereafter argument was heard by the Court of Appeals on October 17, 1952.

On November 5, 1952, the Court of Appeals entered judgment sustaining the motion to dismiss and the petition for a writ of mandamus was dismissed. (R. 130). In a per curiam opinion filed on the same date, the Court of Appeals stated that "... no fact or reason is stated showing that the relief by mandamus is an appropriate remedy." (R. 130).

Plaintiff filed a petition for rehearing on November

25, 1952 (R. 122-126), and rehearing was denied by the Court on December 12, 1952 (R. 126).

Thereafter, on February 15, 1953, plaintiff filed in this Court a petition for writ of certiorari and a brief in support thereof asking to have this Court grant a writ of certiorari directed to the Court of Appeals for the Fifth Circuit and to order that Court to afford the relief prayed by plaintiff in its petition to that Court for a writ of mandamus.

VI

ARGUMENT AND CITATION OF AUTHORITIES

C. None of the reasons advanced by the petitioner are addressed to the principles of law by which the decision of the Court of Appeals is controlled.

Petitioner in the Court of Appeals invoked the jurisdiction of that Court by 28 U.S.C. 1651 (a) "to issue a writ of mandamus to aid maintenance and protection of its appellate jurisdiction." (R. 10). Clearly the writ of mandamus may be issued under the cited section only for that purpose.⁵

The question then is whether or not a Court of Appeals is required, "in aid of . . . (its appellate) . . . jurisdiction", to issue a writ of mandamus to compel a district judge within the circuit to vacate an order transferring, under 28 U.S.C. 1405 (a), a case to another district within the same circuit when the same Court of Appeals exercises appellate jurisdiction over all cases pending in either district. The respondents take the position that this question should be answered in the negative.

⁵ *Reche v. Evaporator Milk Ass'n*, 319 U.S. 21; *U. S. Alkali Export Ass'n, Inc. v. The United States*, 325 U.S. 196.

When an order transfer is issued under 28 U.S.C. 1404 (a), such an order neither creates a right of appeal nor is it one which is beyond the power of the district court. As such, it does not interfere with the right of mandamus to be issued to set aside the transfer. The transfer is not a final judgment and thus cannot be reviewed by the appellate court. See *Booke v. Evangelical MHA Ass'n*, 519 U.S. 31, 117 S.Ct. 1039, 136 L.Ed.2d 808 (1997).

Finally, even if it were to be held that the transfer was a final judgment, the writ of mandamus would not be available. 28 U.S.C. 1404 and 1406 (a) provide that the transfer is to be made by the district court. The Supreme Court in *Booke v. Evangelical MHA Ass'n*, 519 U.S. 31, 117 S.Ct. 1039, 136 L.Ed.2d 808 (1997), held that the district court's transfer is not a final judgment and thus cannot be reviewed by the appellate court. The Supreme Court in *Booke v. Evangelical MHA Ass'n*, 519 U.S. 31, 117 S.Ct. 1039, 136 L.Ed.2d 808 (1997), held that the district court's transfer is not a final judgment and thus cannot be reviewed by the appellate court. The Supreme Court in *Booke v. Evangelical MHA Ass'n*, 519 U.S. 31, 117 S.Ct. 1039, 136 L.Ed.2d 808 (1997), held that the district court's transfer is not a final judgment and thus cannot be reviewed by the appellate court.

"Here the intervention is the plaintiff's suit alone from the circumstances. The Congress has provided for review of the District Court's order only on review of the final judgment, and not from an abuse of judicial power or refusal to exercise it, which it is the function of mandamus to correct."

Respondents have been unable to find any case where a writ of mandamus has been issued to review an order of transfer between districts within the same circuit.⁷ The Eighth Circuit also observed this in *Carr v. Donohoe*, 201 F.2d 424.

⁶ *Booke v. Evangelical MHA Ass'n*, 519 U.S. 31, 117 S.Ct. 1039, 136 L.Ed.2d 808 (1997); *Gul/ Research and Development Company v. Harrison* (CA 9) 198 F. (2d) 457; *Gul/ Research and Development Company v. Leach*, (CA 9) 198 F. (2d) 204.

⁷ The case of *Shapiro v. Bennett Hotel Company* (CA 9) 198 F. 2d 777 involved transfer under 28 U.S.C. 1404 (a) between districts within the same circuit but in that case the writ was denied.